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Court Knocks Out \$200 Million Claim Against Top 30 Firm

Judge tells plaintiffs: 'I think this is a stick-up.'

A federal judge approved the dismissal of a \$200 million lawsuit against the Miami-based accounting firm formerly known as **Rachlin Cohen & Holtz** and Senior Partner Laurie S. Holtz.

The dismissal followed two orders from the judge, which excluded the plaintiff's expert witness from testifying and barred its \$200 million damages claim against the firm.

The plaintiffs relied on "a bogus calculation ... and failed to produce any evidence supporting it," the judge said.

RC&H merged with New York-based **Marcum LLP** in 2009. Marcum has FY10 net revenue of \$250.8 million, 145 partners, 687 total staff and 22 offices.

The lawsuit stemmed from a massive fraud involving Frank Amodeo and Orlando, Fla.-based Mirabilis Ventures, one of several entities involved in the misappropriation of payroll taxes collected by professional employer organizations. Mirabilis and Amodeo both were convicted, and Amodeo was sentenced to more than 20 years in federal prison in connection to the fraud.

U.S. District Judge Gregory A. Presnell entered his two orders after hearings on the evidence to be presented at trial.

"My overall sense of this whole thing is that to allow this ... to go to the jury would be about as big a holdup as Mr. Amodeo accomplished," Presnell said at the hearings' conclusion. "I think this is a stick-up."

Amodeo and his co-conspirators used the diverted funds to purchase real estate, a Lear jet, automobiles and other property. In addition to his prison

sentence, Amodeo was ordered to pay \$180 million in restitution to the IRS for his role in the fraud. Mirabilis was convicted for conspiring with Amodeo and ordered to pay \$200 million as restitution and forfeiture based on its criminal conviction.

Bankruptcy liquidator R.W. Cuthill filed the complaint against RC&H on behalf of Mirabilis Ventures. The firm performed tax-related work for Mirabilis but performed no audit work.

"This is a classic case of somebody suing you because somebody has to be at fault because something bad happened, but really there *was* no fault," said Jeffrey Weiner, managing partner at Marcum LLP. "It was a fraud committed at the company, which is the reason it went out of business, but we were not culpable or responsible for the fraud. In fact, the person responsible went to jail."

Marcum decided to merge with Rachlin while the suit was pending and to continue fighting it, Weiner told *PAR*.

"You have to have a stomach for these things. You can't just run and hide if somebody sues you and you're not wrong," Weiner said.

The firm didn't settle because, "First of all, we were being sued for a lot of money, and secondly, you can't be known as people who settle. Make sure people know they will spend a lot of money if they sue you," Weiner said.

"You must have the reputation that whatever it takes, you'll defend yourself. It costs money to sue you ... and if people know you don't settle, they'll think twice about spending their money knowing you'll go the distance. Part of that philosophy is knowing you didn't do anything

wrong," added Weiner.

The pending litigation wasn't a factor in RC&H's decision to merge with Marcum. While it was considered in the deal's due diligence, it wasn't a key issue with Marcum, Weiner said.

"This lawsuit was in place prior to the merger," he explained. "We did our own internal investigation as due diligence and were satisfied that this lawsuit would ultimately be dismissed," Weiner said.

"We took into account the cost of defending the suit, so we did the deal with our eyes open. We were confident all along. This lawsuit had no basis, and the results prove that. We've never lost a lawsuit in our 60-year history of business. It was not a factor in the Rachlin deal," he told *PAR*.

This lawsuit is a prime example of the risk confronting public accounting firms when a company fails, said Joseph DeMaria, a partner at the law firm Tew Cardenas of Miami, who was a lead attorney representing RC&H.

"This is an issue that public accountants are constantly facing: they're being blamed for everything that goes wrong when a company fails," DeMaria told *PAR*. "They have to fight back."

Two factors made this case especially egregious, DeMaria said.

"First, the company itself pleaded no contest, was convicted and tried to shift



Joseph DeMaria

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the blame to the accountants," said DeMaria. "This company didn't fail because of the economy: It failed because a guy was running a massive fraud."

Second, RC&H wasn't the auditor. The firm "did very specific due-diligence work, but the plaintiffs said, 'You're accountants, you did work for the company, and you should be responsible for \$200 million,'" DeMaria noted.

Nevertheless, fighting the case was risky, because the potential liability was so much money.

"So there was a lot of pressure to settle, but we were so outraged that we wanted to fight it," DeMaria said.

DeMaria's strategy was to not have the case thrown out entirely but to cripple it so extensively that the plaintiffs would have no incentive to continue it.

The attorneys successfully argued that there was no evidence to support the testimony of Cuthill's expert witness, Barry J. Epstein of Chicago, and that RC&H was not Mirabilis's auditor and didn't violate its duties to the company. The judge agreed: after the hearing, Presnell excluded Epstein from testifying at trial and barred the \$200 million damages claim.

The plaintiffs must have expert testimony for this type of case to go to trial. Eliminating Epstein as an expert witness would leave a big hole in the

plaintiff's ability to go to trial, DeMaria told *PAR*.

DeMaria's co-counsel, Thomas Tew, successfully argued that Epstein is an expert in audit cases, but RC&H's work for Mirabilis didn't fall into the domain of his expertise.

"This is a guy who normally testifies in public audit cases, but this wasn't an audit case," Tew said.

Another tactic was to eliminate the plaintiffs' ability to win a judgment at trial for \$200 million. RC&H's lawyers successfully argued that the notion that a company convicted of extreme criminal activity could hold an accounting firm performing tax consulting work liable for that excessive level of damage was a ridiculous claim, DeMaria explained: "How can a company that's been convicted blame its accountants?"

DeMaria and his team didn't want all the damages thrown out, because then the plaintiffs could have immediately appealed. So they successfully argued that the claim for damages should be no more than \$400,000, even though they didn't think the accounting firm was responsible for any damage.

"We wanted to cut their arms off and cut their legs off, but not quite kill them," DeMaria said.

It worked: the plaintiffs dropped the case after the judge's rulings. ■



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